IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, :

Petitioner :

v. : No. 06-1005

EFRAIN SANTOS AND :

BENEDICTO DIAZ :

Washington, D.C.

Wednesday, October, 3, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

TODD G. VARE, ESQ., Indianapolis, Ind.; on behalf of Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-1005, United States versus Santos.

Mr. Roberts.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE PETITIONER

MR. ROBERTS: Mr. Chief Justice, and may it please the Court:

The Seventh Circuit misconstrued the Federal money laundering statute by interpreting the term "proceeds" to mean profits. The statute prohibits the laundering of all the gross receipts of a crime, not just its profits. The primary meaning of "proceeds" is gross receipts, and the statutory context makes clear that's the meaning Congress intended here. The statute is structured to prevent criminals from using the fruits of their crimes to promote or to conceal their illegal activities. But a profits definition of proceeds would constrict the statute in ways that can't be squared with that statutory objective.

Because the word "proceeds" appears in the introductory section of the statute, those kinds of restrictions would apply to both concealment and promotion cases.

For example, the statute wouldn't cover expense payments that are structured to conceal the unlawful nature and source of the funds involved. That means that if an illegal gambling operator recorded the compensation that he paid his collectors as salary payments by a legitimate business that he owned, that that would not be covered under the statute.

JUSTICE SCALIA: Where -- so what?

MR. ROBERTS: Well, Congress was trying --

JUSTICE SCALIA: Is there some rule up there that says every criminal statute has to cover as much as possible?

MR. ROBERTS: No, Your Honor. That's not what we're arguing. What we're arguing is that there is no reason that Congress wouldn't have covered these transactions and that they implicate the objectives of the statute as revealed by its text, just as much as the transactions that are clearly covered.

JUSTICE SCALIA: I think it -- I think it much more remarkable than that, more extraordinary than that, that Congress would want to make all -- all betting operations like this a violation automatically of two criminal statutes.

MR. ROBERTS: Well, Your Honor --

JUSTICE SCALIA: I find that sort of, you

know, very strange.

MR. ROBERTS: -- it is certainly true that illegal gambling and money laundering are going to occur together, but that isn't a cause for concern. It just reflects the fact that certain businesses, illegal businesses like gambling operations, like drug dealing, frequently generate large amounts of cash and they need to launder that cash in order to survive and to prosper.

JUSTICE GINSBURG: It is hard to see this -- that, just in the sense of laundering, nothing is being concealed. They're not -- the money that's being paid to the runners and the collectors, it is an ordinary and necessary expense of the illegal business.

So I think Justice Scalia was emphasizing that this is, for the very same conduct two discrete statutes, one with much heavier penalties. That makes it odd, too, that the basic gambling statute has a lower penalty than this money laundering statute, and yet it's the same conduct that's violating both.

MR. ROBERTS: Well, it's not the same conduct in that the conduct here, the paying the winners and paying the collectors is not a required element of the gambling offense.

JUSTICE SCALIA: Oh well, I mean -- come on. Nobody -- nobody runs a gambling operation without

paying off the winners. It's not going to last very long.

MR. ROBERTS: And, true --

JUSTICE SCALIA: To make the paying off of the winners a separate crime from running the gambling operation seems to me quite extraordinary.

MR. ROBERTS: It -- it -- it's true, Your Honor, that they're not going to last very long. They're not going to survive. They're not going to grow. That's because they need to commit money laundering in different ways to do that.

JUSTICE SCALIA: But even if --

JUSTICE KENNEDY: Can you tell me what happens if there's a -- two bank robbers, the one's with the get-away car; the other one going into the bank teller, and the robber that goes into the bank gets $1,000 and comes out and gives 500 to the get-away guy. Is that a violation of the statute?

MR. ROBERTS: That is, if the -- if the payment would promote the continuing -- if they've got a continuing robbery operation and by paying him he's going to say, he's saying, you know, keep on continuing in the operation and let's expand it further.

JUSTICE SOUTER: Then under your theory the employee who gets paid shows up for work the next

morning; and so, of course, under your theory it would be promotion.

MR. ROBERTS: Your Honor, your question and a lot of the questions I'm getting, I think express concern about treating these transactions as promotion under the statute. But the question --

JUSTICE SOUTER: I would have the same concern if we were dealing with concealment.

MR. ROBERTS: What I don't --

JUSTICE SOUTER: If the robbery takes place in a dark alley, is that automatically concealment?

MR. ROBERTS: No, because what needs to be concealed, what there needs to be is a financial transaction that's designed, the transaction itself, to conceal the nature and source of the proceeds.

JUSTICE SOUTER: That's going into the alley instead of doing it out on the --

MR. ROBERTS: I don't think that doing a robbery in the alley would be a financial transaction -- would be designing a financial transaction to conceal the unlawful nature and source of the proceeds.

But if I can give you an example of --

JUSTICE ALITO: Mr. Roberts, isn't it true that the problems that are being highlighted are problems that result from expansive interpretations of

other concepts that are not before us here, expansive interpretation of promotion, expansive interpretation of concealment?

The Seventh Circuit in the first appeal in this case interpreted promotion very broadly. And then, I guess it felt that it had boxed itself in and that's what led to this interpretation of proceeds. But if you interpret those other concepts more narrowly, you don't have the same kind of overlap.

MR. ROBERTS: I agree with that, Your Honor. I was going to try to say to Justice Souter's question before that if you have concerns that these kind of expense payments should not be treated as promotional money laundering, the way to address those is not by adopting a profit construction of proceeds, because that would do tremendous violence to the statute in other ways.

And I do think that there are --

JUSTICE GINSBURG: What about the qualification that Judge Easterbrook made when he said, at least where the crime is a business-like operation? He gave the example of gambling, he gave the example of selling contraband.

And it seems to me that he was narrowing his definition of proceeds to cases where the crime is not

robbery or a one-time event, but a business-like operation.

MR. ROBERTS: Well, I think it's difficult to interpret the proceeds, the term "proceeds," to mean something different for business operations than for other crimes because it's the same word. But even so, Your Honor, there are other ways --

CHIEF JUSTICE ROBERTS: Why don't you continue. I'm sorry. I didn't know you weren't done.

MR. ROBERTS: Okay. I'm sorry.

Even so, there are other ways in which a profits definition just makes no sense under this statute, besides the numerous concealment transactions that would be excluded that Congress would have no reason not to cover. It also would make no sense as applied to professional money launderers. Those are people who are hiding money for criminals as a matter of their business. Because they wouldn't be guilty of money laundering, even if they knew that they were concealing money that was generated by a Federal felony, unless they also knew that the money was profits.

CHIEF JUSTICE ROBERTS: I thought your answer to the line of questioning that we were having was that the problem would still be there, even if you limited this statute to profits. You take the two bank

robbers in Justice Kennedy's hypothetical, the one that robs the bank, the other in the get-away car. If before the robber gave the money to the person in the get-away car, he said, now, you know, I'm keeping $100 because I had to buy the gun and that was $100, so you only get 400, so it's only the profits that they're splitting, you'd have the same problem, wouldn't you?

MR. ROBERTS: That's right. That's another point, Your Honor, that a profits definition itself isn't going to solve the problem of where the underlying crime and the money laundering --

JUSTICE SCALIA: It will solve a lot them. And unless you're willing to come in and say, yes, do it to us, give us a narrower definition of concealment and a narrower definition of what's a transaction, but you're not willing to do that. You're going to stretch that as broadly as you can.

MR. ROBERTS: It's not going to -- it's not -- first of all, this case doesn't present the interpretation of promotion and the Court would be free to address that in --

JUSTICE STEVENS: Maybe the question presented doesn't present it -- -

MR. ROBERTS: Yes.

JUSTICE STEVENS: But I think the facts of

the case do present it. I mean, it's theoretically possible we could agree with you on the profits issue, but nevertheless say this doesn't fit the promotion.

MR. ROBERTS: You certainly could, Your Honor. But that would not be an alternative ground that would be appropriate for you to rule on in this case, because that issue was raised on direct appeal. It was decided against Respondents by the --

JUSTICE STEVENS: I understand all that, but we can still do it if it's perfectly obvious that that's the right way to dispose of the case.

MR. ROBERTS: You can obviously address any issue that you want to, Your Honor. But the ordinary rule is that issues that have been decided on direct review shouldn't be relitigated on collateral attack. The issue wasn't addressed by either of the courts below in these collateral proceedings.

JUSTICE GINSBURG: Wouldn't it be --

MR. ROBERTS: We do submit that it was resolved correctly in this case, because, as the Seventh Circuit held and as all the other courts of appeals have held about promotion, the payments to the winners and the payments to the collectors encourage the continued participation of the collectors and encourage the increased participation by gamblers.

JUSTICE GINSBURG: Mr. Roberts, the Seventh Circuit in this case was following a precedent in another case and it thought that the defendant was would prevail under its theory.

If this Court should say that that theory, that it's profits and not proceeds that matter, wouldn't it be appropriate for us, if we don't decide the question ourselves, to remand and say, Seventh Circuit, your precedent was wrong; but you could consider a question that was not necessary for you to reach because you had your precedent on the profits issue?

MR. ROBERTS: You could do that, but the question that I think that is concerning the Court was resolved by the Seventh Circuit in this very case on direct appeal. So on direct appeal, the argument was made by Mr. Santos that these transactions can't count as promotional money laundering because they're essential transactions of the business and that they don't promote the carrying on of the business, and the court of appeals rejected those arguments.

JUSTICE SCALIA: You might well reject it if you're going to have a narrow definition of proceeds. I mean, that rejection was connected with its acceptance of a narrow definition of proceeds. And if you're asking us to obliterate the latter, I don't know why it

isn't reasonable to send it back to the Seventh Circuit and say, well, you still said the same thing if you came out differently on the proceeds question.

MR. ROBERTS: Well, we certainly would prefer that you did that than that you interpreted proceeds to mean profits because of the violence that it would do to the remainder of the statute, Your Honor.

I was talking about professional money launderers before and how they wouldn't be guilty of money laundering if they were concealing money that they knew that was generated by a crime. And Congress -- there's no reason that Congress would have considered those professional money launderers to be less culpable merely because they might be laundering only illicit receipts.

And It would be very difficult for the government to prove that professional money launderers knew that they were laundering profits because they haven't participated in the predicate crime.

JUSTICE BREYER: I've got that point, but what is your suggestion as to how to deal with what is underlying disturbing me and it seems like a lot of others, if prima facie Congress did not intend that you launder money where the activity is an essential part of the underlying crime itself? And there are three ways

of dealing with that:

One is this gross receipts method, which has the defects you mentioned.

The second is a definition of "promotion" which says when you promote a crime that's different from engaging in the crime.

And the third is sentencing; because it's a real offense sentencing method and where what you've done is nothing more than the underlying crime, the sentence should be nothing more than the underlying crime. I see three ways to get to the same problem, and you're asking us to decide them piecemeal, yet they're related. What do I do?

MR. ROBERTS: Well, I think you decide the question presented here and you decide that proceeds means that -- that proceeds means gross receipts, because that's the only meaning that makes sense with the statute.

But the sentencing point you make is a very, very good one, Your Honor. And the fact is that the Sentencing Guidelines were changed in 2001 to align the punishment for money laundering when people participate in the underlying crime much more with the punishment level for the underlying crime.

And -- you know, in addition, as we know,

the Sentencing Guidelines are advisory, and so courts could certainly take into account concern about overlap --

JUSTICE BREYER: But still your answer leaves me -- and I have no answer to this; I want yours. I want you to see that I'm in -- at risk here as a judge of getting whipsawed, that I first decide this case for you; and the next case, all kinds of arguments appear that I hadn't thought of; and then the third case, again. But if I could have them somehow together, I could look at the least evil way or the most efficient way of achieving the congressional objective.

MR. ROBERTS: Well, I think that you can't have all of them together, Your Honor, unfortunately. But I do think that we would say that out of the three that you raised, the best way to deal with concerns about this would be in the sentencing context.

JUSTICE SCALIA: I find that extraordinary. You really come in and say yeah, two crimes, assume Congress meant ordinary gambling crime to carry with it this other extraordinarily high penalty for the same activity that involves the gambling, but don't worry about it, we'll even it out in the sentencing.

I mean -- that's no way to run a railroad.

MR. ROBERTS: It's not -- Your Honor, it's

just not exactly the same activity, because people can commit gambling without commit money laundering. They can be guilt of illegal gambling without being guilty of money laundering --

JUSTICE SCALIA: Straighten that out in the definition of the crime, rather than in the --

MR. ROBERTS: But they can be -- even under this definition, Your Honor. In this very case there were restaurant and tavern owners that permitted the gambling bets to be taken on their premises because it increased their -- the patronage of their businesses. And they were convicted of participating in illegal gambling operations. They didn't commit money laundering, because they didn't engage in a financial transaction that's not an element of the gambling offense, that involves the proceeds of the offense, and that's intended either to conceal the proceeds --

JUSTICE STEVENS: -- Mr. Roberts -- that the gambling offense is conducting a gambling business, so it makes it -- it is not just the gambling itself --

MR. ROBERTS: It is -- but the statute defines what the three -- the statue defines what the three elements of the gambling business are, Your Honor. That it's illegal gambling that's illegal under State law, that involves 5 or more persons, that it has --

continues for more than 30 days or has more than $2,000 in gross revenues in a day.

JUSTICE SCALIA: What continues? The business has to continue. You are not engaging in a gambling business if you're not paying off the winners. That's all. That's not a good decent honest gambling business.

(Laughter.)

MR. ROBERTS: The gambling business -- it might be gambling and fraud, Your Honor. But the gambling business can continue for more than 30 days without having paid the winners if they had a lottery every month, and it was at the end of the month -- they hadn't paid the winners yet, it would have gone for the 30 days, in a 31-day month without -- without having paid the winners.

JUSTICE KENNEDY: And -- if your definition of proceeds is problematic, it is something like an abstract question you're asking us to answer. If this -- if we say well, we're not sure this is proceeds but if it is proceeds, it is defined as gross receipts.

That's an artificial context in which to address the issue.

MR. ROBERTS: Yes. I think that what they're asking you to do is to interpret -- and what the

Seventh Circuit has done, is to interpret proceeds in a way that makes no sense for the statute in order to deal with these concerns about promotion cases that can be dealt with in the other ways that Justice Breyer raised. And there are really four --

JUSTICE GINSBURG: Mr. Robert, may I go back to something you said about -- of the options that Justice Breyer mentioned.

You said the way to handle it is in sentencing.

Santos was sentenced to 60 months on the gambling counts and 210 months on the laundering. You said the statute has been changed. So what would be the sentence under the statute as it now exists? And this is vastly disproportionate. 60 months for gambling, and 210 for money laundering.

MR. ROBERTS: I'm sorry, Your Honor. I probably should know the answer to what the precise range would be under the guidelines. Now, I don't. But what I do know is before, the way the guidelines worked was that the base offense level for a money laundering crime was not tied to the offense level for the underlying offense. So it was set I think starting at 23 for promotional money laundering.

But what happened in 2001 is that the

commission changed the rules so that when you -- when the money laundering involves the person who participated in the underlying offense and has also done the money laundering, you start with the offense level for the underlying offense and then you make some minor increases depending upon the type and the --

JUSTICE BREYER: I have it in front of me actually. I was looking at it. And it seems to me what it assumes is that the underlying offense is different from the money laundering. And do you have any rationale at all as to why this individual, if it's true that he did nothing more than engage in the underlying offense, why should he receive one day more than 60 months?

MR. ROBERTS: Well, because he does engage in something more than what he needs to do to be punished for the underlying offense, and that conduct is -- and that conduct is -- promotes ongoing crime or can conceal ongoing crime in ways that are just what Congress was getting at in the statute. And --

JUSTICE SCALIA: Because gambling under the definition has the three elements that do not include paying off the winners. That's what it all represents --

MR. ROBERTS: Because -- well, that's one

thing, but the other thing is, Your Honor, if I could talk about the ways that the proceeds definition just doesn't make sense here. If these expense payments -- the expense payments for instance, the payment of the salary that Mr. Santos made to Mr. Diaz -- it happens in this very case, although we didn't prosecute it as concealment money laundering -- that he recorded those payments as salary payments by a printing business that he owned.

And he's doing that to conceal the activity, to enable it to keep going. And that's just what Congress was trying to get in the statute. Wouldn't be covered under a profits definition. If criminals concealed the gross receipts temporarily until they pay the expenses -- for instance, if a gambling operator takes the money that -- his illicit receipts from the gambling, and he puts it in the bank account of the printing business. And then later he uses it to pay the winning betters, he's doing that to hide it so the gambling operation can keep going. That's what Congress was trying to get at here. That wouldn't be covered.

That -- that evades detection just as much as transactions that hide profit.

JUSTICE STEVENS: You are saying it would not be covered as money laundering, but nevertheless it

would be illegal and be punished as gambling.

MR. ROBERTS: Yes, it would, Your Honor. But the conduct, the concealment conduct --

JUSTICE STEVENS: And everything they've done here would be punished as gambling --

MR. ROBERTS: -- the concealment conduct is additional conduct, and it is what Congress wanted to get at here, and a profits definition would mean that it is excluded from the statute.

And it would exclude the --

JUSTICE KENNEDY: Well, you see the problem we have is we're not sure that it is within the statute. So then you're asking us to say how to make the statute work when we don't think the statute's applicable at all.

MR. ROBERTS: Well, I guess if you don't think that concealing expense payments should be covered, if you don't think concealing money that is --

JUSTICE STEVENS: Can you imagine running a illegal gambling business and advertising your expenses? I mean, you have got to conceal these --

MR. ROBERTS: It's not a question of advertising them, Your Honor. It's not a question of advertising them, but it is a question of taking additional conduct to conceal them.

JUSTICE STEVENS: But it's not additional conduct. That's the point.

MR. ROBERTS: It is additional conduct. He didn't need to record it on the books of the -- on the books of his printing business.

JUSTICE SOUTER: What if he puts it in a tin can and buries it in the garden? Is that additional conduct?

JUSTICE SCALIA: Of course it is.

MR. ROBERTS: It's additional conduct, but it's not designed to conceal the unlawful nature --

JUSTICE SOUTER: Why isn't it? Do you put your salary in tin cans in the garden?

MR. ROBERTS: I might like to keep my money in the cookie jar -- and it's perfectly legitimate money, Your Honor -- because I don't want when someone comes into my house that -- for them to steal the cash.

JUSTICE SOUTER: I just don't see how you can make the distinction you're making, and therefore I don't see how you can avoid Justice Stevens's problem.

MR. ROBERTS: If he takes the money, Your Honor, and he structures his payments to his employees by making them -- or to his suppliers, by making them in $9,000 increments in order to evade transaction reporting requirements, that wouldn't be covered either

under this interpretation of the statute.

JUSTICE ALITO: Mr. Roberts, isn't it true that the Seventh Circuit's interpretation of proceeds doesn't really solve these problems except in the case of an unprofitable business? In the case of a profitable illegal enterprise, all of the same problems exist.

MR. ROBERTS: I think there are many situations, as the Chief Justice pointed out, in which a profits definition isn't going to be enough to solve it. For instance, just a drug dealer accepts payment for the drugs. If that money exceeds the cost of the business, it would presumably be profit and without some other requirement in the statute, it would count as money laundering. And for instance, when street-level dealers that are employed by a drug kingpin turn the receipts over to the kingpin even after they've take out their share, let's say -- under a profits definition if those receipts exceeded the costs of the business that would also be covered as money laundering. So I think it's very true that the profits definition isn't going to solve all the problems as well.

That's a -- you know -- another point about it.

It also means that what we have to prove

profits that that's going to be very difficult for us to do even in cases that don't involve these expense payments because criminals often don't keep accounting records. They certainly don't keep records that are accurate and complete and decipherable by law enforcement. And Congress recognized the lack of hard evidence of criminal profits, and for that reason Congress provided for the forfeiture of proceeds rather than profits in the RICO and drug forfeiture statutes. And there's no reason to think Congress took a different approach here in the money laundering statute, two years later, when it used the same term "proceeds."

There's also -- there's the issue of the uncertainty that would be created by a profits definition, because it would raise all these questions, and there are no accounting rules to resolve them.

And even the court below acknowledged that it's difficult to determine what is and isn't net income, and that the line between paying expenses and reinvesting that income is murky.

And I don't think the Court should lightly assume that Congress intended a definition of an element of the offense that's going to raise these numerous issues about the scope of that essential element of the offense. And the Court is going to have to resolve them

all without any guidance from Congress.

So if I could reserve the reminder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ROBERTS: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Vare.

ORAL ARGUMENT OF TODD G. VARE

ON BEHALF OF RESPONDENTS

MR. VARE: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Ginsburg, you have suggested correctly that the only conduct in this case was the payment of ordinary and necessary expenses of the business.

Justice Scalia, you correctly suggested that paying off winners is necessary to every gambling operation.

Justice Breyer, you have correctly suggested and stated that the money laundering statute is intended to punish different conduct, different criminal activity than the underlying criminal activity.

CHIEF JUSTICE ROBERTS: Didn't Justice Alito correctly suggest that these merger problems would still persist even under your definition of "proceeds"?

MR. VARE: I think that that is not

necessarily true. The merger problems would -- would exist except for the "profits definition," certainly on the facts of these cases -- on this case.

On this case the only facts that were presented by the Government -- and they have conceded that they did not present any evidence of profits.

CHIEF JUSTICE ROBERTS: No, but I mean if you have a "profits" definition and the enterprise has profits, all of these problems we've been talking about in terms of the merger, as I call it, between the money laundering and the underlying offense would still be there, right?

MR. VARE: Yes, Your Honor. There would. There would. And, in fact, Justice Alito also correctly suggested that the reason why the Scialabba panel decided the "proceeds" definition is profits was because of the expansive interpretation and application of the other aspects of the statute, and that they were left with essentially no choice.

JUSTICE SCALIA: So why are you urging us to create two problems, to drag along all of the problems that you object to with -- with interpreting proceeds to include simply covering your expenses? You acknowledge that the problems you point out would continue to exist if we accept your definition.

On the other hand, I think you have to acknowledge that accepting your definition creates other problems of its own, such as the difficulty in every case of showing that an illegal operation made a profit, such as the difficulty of deciding what kind of criteria you use for determining what are the -- what are the ordinary and necessary expenses of a criminal enterprise.

Why should we -- why should we choose to get the worst of both worlds? And why isn't the proper way to attack the difficulty to focus in on what constitutes a transaction and what constitutes concealment -- something other than the "proceeds" definition?

MR. VARE: I think you're absolutely correct, Justice Scalia. And, in fact, in our opposition to the petition for cert in this case, we made this very point as to why this was not the right case to determine all of these issues, and particularly the burdens that have been presented by the government.

JUSTICE KENNEDY: Did you argue at any point that these were not proceeds?

MR. VARE: Yes, Your Honor, we did. Justice Kennedy, in the briefing in the opposition to cert and in our response brief, we have set forth distinct arguments that there are not separate

transactions distinct and different from the underlying criminal activity.

JUSTICE KENNEDY: Did you argue that in the court of appeals?

MR. VARE: That was presented as -- that was presented as part of the Febus decision as an argument that those transactions did not constitute distinct and separate transactions from gambling. That was presented in the pro se petition and acknowledged by the government in responding to the pro se petition below.

The government acknowledged that the question in Febus, the question in Scialabba, the question in this case on habeas are legally and factually indistinguishable. And I think Justice Stevens has suggested that all of this is inherent in the question presented.

A fair -- it is fairly included because to look at the statutory context of the word "proceeds" is necessary for an intelligent resolution of the meaning of that word as well as how it plays throughout the rest of the statute.

JUSTICE BREYER: The question is can you violate the statute by financial transactions which -- have you promoted the crime, when those transactions are no more than part of the crime itself?

That's basically the question. And I think Justice Kennedy is asking if, in fact, we wanted to reach that question, is this a case in which we could do it, through reargument or in some other way?

MR. VARE: I think that that is a question that this Court could resolve on the facts of this case, or --

JUSTICE BREYER: And was it raised in the court below?

MR. VARE: It was -- it was raised in the court below as -- as inherent -- well, it was certainly raised in the Febus, in the direct appeal.

It is inherent in the 2255 petition filed pro se by my client, Mr. Santos. It was acknowledged by the government that these issues are not legally or factually distinguishable.

And again, it is inherent in the question that's presented. The money laundering statute requires conducting a financial transaction involving the proceeds of the specified unlawful activity with the intent to promote the --

JUSTICE KENNEDY: Well, I think it is a stretch so far as the question presented. The question presented is very clear whether or not it is gross receipts or net profits. That's what we're asked to

resolve.

JUSTICE GINSBURG: That's not your question presented.

MR. VARE: Absolutely not, Justice Ginsburg. It is not our question presented, but we do feel that, even in answering that question, whether or not it is net or gross does require looking at the term in context. And -- and the context, we're not looking at a different statute.

CHIEF JUSTICE ROBERTS: I didn't see that you presented -- a separate question presented in your opposition.

MR. VARE: We did , Your Honor.

CHIEF JUSTICE ROBERTS: Where is that?

MR. VARE: In the -- Mr. Chief Justice --

CHIEF JUSTICE ROBERTS: Not at page (ii).

MR. VARE: In Mr. Santos' brief. And the question presented there was --

JUSTICE KENNEDY: Brief in opposition --

MR. VARE: The brief in opposition on the very first page.

CHIEF JUSTICE ROBERTS: Oh, but I am looking at the orange one, not the red one. The orange one is what we have before us when we decide whether or not to grant certiorari. And there you don't have a different

question presented.

MR. VARE: No, we did not -- in the opposition to the cert petition we did not present a different question presented as a question presented.

But we did present the argument -- Mr. Santos did and Mr. Diaz did -- that there were no separate transactions that promoted the carrying on of the specified unlawful activity. Rather, all that the government had presented in this case was merely conducting the illegal gambling business.

CHIEF JUSTICE ROBERTS: If we adopt your position, we will have to decide a question like, for example, if the argument is I didn't have any profits because I had to pay $10,000 for a hit man to kill somebody, we would have to have a judicial decision that, yes, paying hit men is the ordinary and necessary business expense in carrying out illegal gambling operations, right?

MR. VARE: I think, Mr. Chief Justice, in any case you're going to have to look at what the specified unlawful activity is in the context of a money laundering prosecution, because that is part of the context.

And so in this case you have to look at what is the ordinary conduct of an illegal gambling business.

And I would suggest that paying off a hit man most likely would not fall into that category. But, certainly, as many of the Justices, including Justice Scalia and Justice Stevens and others have suggested, that when a gambling business pays off its winners, that is inherent -- that is integral -- to conducting a gambling business. It is not --

CHIEF JUSTICE ROBERTS: Let's take two illegal gambling operations that are identical in every way except that the one pays the runners, you know, $200 a week. The other pays the runners $500 a week. And the one that pays $500 doesn't make any profits because he's paying too much to the runners.

The first one, the more successful operation, you say, can be prosecuted for money laundering because its has profits. The other one doesn't. So incompetence is rewarded.

MR. VARE: No, Mr. Chief Justice. I would say that neither one could be prosecuted for money laundering because in both situations --

CHIEF JUSTICE ROBERTS: But the --

MR. VARE: -- when in both situations the gambling operator is simply paying off ordinary business expenses. Just the collectors who are part and parcel of running the illegal gambling business, they're one of

the participants. And that's part of the illegal gambling statute, is that you have to have five or more participants.

CHIEF JUSTICE ROBERTS: No, I'm focusing on the question presented -- that was the only question presented when we considered whether to grant certiorari by either of the parties, and that focuses solely on the question of whether "proceeds" is considered gross revenues or profits.

MR. VARE: Well, Mr. Chief Justice, what I -- what I believe is the answer to your question is -- is you cannot look at the term "proceeds" in isolation. And Justice Breyer, you know, suggested that the reason why we're even here today, arguing about what I believe is just absurd and unwarranted results on the facts of this case, is because the courts below -- and the government has proposed expansive interpretations -- the courts below have adopted, in some cases and not others, these expansive interpretations.

JUSTICE ALITO: But this doesn't -- "proceeds" must mean the same thing in every money laundering case, doesn't it? And every money laundering case is not based on a gambling business. There are drug businesses and all sorts of other predicates.

MR. VARE: Well --

JUSTICE ALITO: Can it mean something different in -- depending on the underlying illegal activity?

MR. VARE: I think there is certainly a suggestion, but that this Court itself has made recently in the Duke Energy case, that a term can have multiple meanings, multiple shades of meanings, and that will depend upon the context. So you have to look at the context and the specified unlawful activity is context.

Now, I'm not suggesting that we adopt a definition of proceeds as net profits in one case for one unlawful activity or gross profits for another unlawful activity or gross receipts for another one.

But the problem that we have presented to us today is due to the piecemeal construction and application of this statute and --

JUSTICE SCALIA: Mr. Vare, you know, I'm -- I'm unwilling to decide the definition of transaction question in the present case because, frankly, I think that's a -- in itself, a very difficult question which we haven't had adequately argued. For example, while I believe, as I've indicated earlier, that paying off the winners is -- is an essential part of a gambling operation, I don't believe that paying off runners necessarily is. You can have a gambling operation

without runners, can't you? You can --

MR. VARE: You could have --

JUSTICE SCALIA: You can -- you can view that as something beyond the mere -- the mere gambling crime. I don't -- I don't think you can view that paying off the winners is beyond the gambling crime, but I do think having a bunch of runners and paying off each of them is not necessarily part of gambling.

MR. VARE: Well, you can have a gambling business without runners per se.

JUSTICE SCALIA: Exactly.

MR. VARE: But you do need, Justice Scalia, you do need five or more participants. And the courts below have defined participants as -- as owners or partners, bartenders, cocktail waitresses, doormen, employees of the business.

And if those are qualifying participants to even establish the -- the predicate for an illegal gambling business, then those participants are most likely going to get paid, and if they get paid, then that is simply part of conducting an illegal gambling business.

I think the fact -- I mean, the fact that the runner in this case, the bet collector, Mr. Diaz, is probably -- you know, illustrates best the unwarranted

result in this case. Mr. Diaz did nothing more in this case than collect wages of about $150 a month or a week, something along those lines, for simply collecting debts, and he was convicted of money laundering and sentenced to 9 years in jail.

Mr. Santos, my client, all he did was pay winners and pay those bet collectors to collect debts, and he -- his sentence was nearly quadrupled.

CHIEF JUSTICE ROBERTS: So someone who simply paid off whoever it is that ships in, you know, a ton of heroin, you'd say is not guilty then? Same thing. I mean, you're just paying off the people who engage in the activities that are necessary for the continuation and promotion of the illegal enterprise.

MR. VARE: Well, I -- I think in that case, Mr. Chief Justice, I would -- I would suggest it might be an incomplete hypothetical, because simply paying the expenses of a crime or simply buying more drugs is not in and of itself -- and I think the government has conceded that in their opening -- that's not in and of itself money laundering. There has to be a transaction that is conducted with the intent to promote the carrying on or separately a transaction that is designed to conceal the legitimate or the illegitimate source of -- of the funds received.

So simply receiving proceeds from an unlawful activity is not enough. And that's clear on the statutory language. You either have to have some promotion element or some concealment element.

JUSTICE ALITO: Let me go back to the question of the definition of "proceeds."

Isn't it very unlikely that Congress would have wanted -- wanted to adopt the net income definition in light of the legal issues and the problems of proof that that would involve?

Let's take the example of an international drug ring that has assets in a foreign country. They may have crops. They may have processing plants, warehouses, trucks, airplanes, et cetera. They ship millions of dollars of drugs into the United States. They get millions of dollars in gross revenue here every year. They hire a professional money launderer to launder the money here. Now, the Government wants to prosecute the money -- the person they hired plus members of the organization.

The person they hired may not know and may not care whether the money that was being laundered was profits or not. And how are you going to prove what -- whether this enterprise was a profitable enterprise or not? They may have -- and they may have enormous gross

revenue, but they may have -- they may have enormous expenses overseas. They may have bought a lot of warehouses and equipment. They may have lost a lot of things because they were raided by the government, destroyed the factory, killed the plants.

It becomes as impossible situation, and why would Congress ever have adopted a definition like that?

MR. VARE: Well, Justice Alito, I don't think it's an impossible situation, number one, and I'll get to that in a second. To address your first question, could Congress have intended this to mean profits knowing that the burdens were so difficult?

To answer that question, then you must look at what else Congress intended, and there's no question that Congress intended to punish different conduct than the underlying criminal activity.

And then you have to look at what Congress intended to get at when they wanted to fill the gap in criminal law, when they want wanted to punish crimes that were not previously punished.

They focused on getting at ill-gotten gains of criminal enterprises. They focused -- and our briefs, you know, set forth the statements that are replete through the debates on the floor, that the Congress was focused on profits of criminal enterprises.

Congress was not focused on the unprofitable criminal enterprise because --

JUSTICE ALITO: I'm sure that's true. They wouldn't be that worried about the unprofitable criminal enterprises because they wouldn't last very long. But there's the -- there still is the problem of proof --

MR. VARE: Absolutely, Justice Alito.

JUSTICE ALITO: -- proving that it's profitable.

MR. VARE: And the proof problem --

JUSTICE SCALIA: Not just proving that it's profitable; proving that the person laundering it knew that it was profits because that's part of the definition of the crime, that scienter. And how can you prove that the fellow knew that it was profits? He would very rarely know whether it was or wasn't. So he skips off scot-free free of the laundering crime.

MR. VARE: Well, Justice Scalia, the intent or the knowledge or the scienter requirement is going to be present. It's going to be a burden on the government to prove, no matter what definition of proceeds is.

But in terms of proving profits, the government is able to prove profits in other criminal financial transaction-type cases in a number of ways. They're not limited to a particular accounting method.

They can choose the accounting method that they want. They're not limited to looking at day after day after day, week after week after week of financial records. They can aggregate records that are selected from particular points in time. And even in --

CHIEF JUSTICE ROBERTS: Well, how do they know even what the fiscal year of these enterprises is? I mean let's suppose you have some costs. They have to buy the poppy field or wherever, but, you know, over 3 years, they're going to make a lot of money. You're saying you can't prosecute them in year 2?

MR. VARE: No, I'm not saying that at all, Mr. Chief Justice, and I think my point would be the government would not even need to look at a fiscal year to prove profits. They would be able to look at a period of time and through their extensive search and seizure efforts --

CHIEF JUSTICE ROBERTS: My point is the profits may not come in immediately, even though the underlying activity is exactly the same.

MR. VARE: That may be the case. They may have a difficult burden of proving profits in the early stages, but most of these prosecutions practically occur after a period of time.

JUSTICE SCALIA: I mean what -- what's the

total stage you look at? Suppose it's profitable 1 month and not the next month, and the loss the second month more than undoes the profits of the first month. Can you still prosecute them for the profits in the first month?

MR. VARE: Certainly, based upon the profits in the first month. They're not limited to that. I mean --

JUSTICE SCALIA: One day they could pick then, they have one good day. And they could --

MR. VARE: And they could profit on that one good day if there are other transactions involved in the profits.

JUSTICE KENNEDY: What about the bank robber -- there's just one bank robbery. They spend $500 to each, to people for their airfare and car rental. They rob the bank. They only get $800. They lost $200. They then give the $800 to the attorney to please -- or to somebody to please launder the money. No profits?

MR. VARE: I don't think that that --

JUSTICE KENNEDY: That would be a very silly result.

MR. VARE: Well, I -- I don't think that, under that hypothetical, even the government would charge those criminals with money laundering.

JUSTICE KENNEDY: No. They gave it to a third person to conceal it, $800.

MR. VARE: Well, if there's --

JUSTICE KENNEDY: 8,000, 8 million.

MR. VARE: Simply giving money to somebody else does not meet the concealment and disguisement element. I mean, there has to be an effort made to disguise the source of the income as being illegitimate.

JUSTICE KENNEDY: Assume that it's proceeds. Assume that they have a money launderer. Under your definition there's still no violation?

MR. VARE: I suppose I would say no. And I'm going to explain why I have to say no, and I'm going to give you a medical word. The profits construction is not perfect. There's no question about that.

But we're here today because it's the only way to resolve the case that came up to this Court based upon the expansive interpretations of the rest of the money laundering cases.

CHIEF JUSTICE ROBERTS: Well that's -- but we don't try to solve every case. We look at particular questions presented. And maybe there's going to be another case coming up in which the issue of how broadly you should construe promotion is, or whether you should have a different definition when the offenses are merged

or not. And we'll confront that when it gets here.

It seems to me that your argument is -- maybe your best argument, but your argument, anyway, is let's avoid this question because of these other mistakes that have been made, mistakes which are not presented to us on the question on which we granted cert.

MR. VARE: I think, Mr. Chief Justice, I'm not asking this Court to avoid any question. What I am saying is that there is a profits construction that if you apply the traditional rules of statutory construction, if you look at the text -- the word itself, "proceeds," does not have a single plain meaning as gross receipts. It is ambiguous. And it has multiple shades of meaning depending upon the context.

If you look at the term "proceeds" in context then, then it will depend upon how one is using it. If I were selling a house, and I asked somebody on the street what would be my proceeds from the sale of my house, in that -- and only in that context, some would say it is the gross. Some would say it is the net. Some would say it depends.

Well, it depends upon what? It depends upon context. That is included in the question presented.

JUSTICE GINSBURG: Well, let's take this

context.

There is, if you are going to go with profit, a question of what expenses? That's one of the difficulties of working with a net proceeds, because we don't know what the expenses that you would deduct, and the hit man was given as one example. You said no, not that one. But salaries to the runners, yes.

To figure out what would count to come up with a net figure is the least difficult, is it not?

MR. VARE: Justice Ginsburg, I think that it is slightly more difficult in the case the government has now, which is really no difficulty at all. I think that it would depend upon the unlawful activity, the specified unlawful activity, what would be the ordinary expenses associated with doing that crime.

And lower courts are well equipped and juries are well equipped to hear evidence, direct and circumstantial, and make inferences and decide those issues.

JUSTICE SCALIA: Why does it have to be the ordinary expense of that? I mean, let's assume the charge is murder, and I happen to use a hit man for the murder. That's proven and whatnot.

Why -- you mean, that isn't part of the murder conviction, simply because I could have done it

without a hit man, I could have done it myself?

MR. VARE: No, I don't think so at all, Justice Scalia.

JUSTICE SCALIA: You think paying the hit man would be part of the murder transaction?

MR. VARE: Absolutely.

JUSTICE SCALIA: Uh-huh.

MR. VARE: But I don't think that that necessarily parlays into whether or not it is money laundering or not.

JUSTICE SCALIA: No, I understand.

MR. VARE: If, for example, the murderer paid the hit man with money to kill somebody and then paid -- you know, used proceeds from the insurance premium that somebody might have been his wife or her husband, and used the proceeds to pay off the money -- the hit man for the next crime or to reward him or something else, to carry on the business or used the insurance proceeds to conceal where they came from, then I think you could create a hypothetical situation of money laundering.

CHIEF JUSTICE ROBERTS: I thought it would depend on whether or not the insurance proceeds exceeded how much he had to pay the hit man, right? Let's say he's not doing it to get the insurance money. It just

so happens he had a $50,000 policy on the victim --

JUSTICE SCALIA: He wanted to kill his wife, right?

CHIEF JUSTICE ROBERTS: Yes. He just wanted to commit the murder, not get the money. And so he pays the hit man $100,000, he gets the $50,000, and then uses it for all these other activities, you'd say no money laundering, because no profits?

MR. VARE: If we assume the expansive interpretations of a transaction promoting the underlying crime that have been presented in this case and then we apply the profits definition, that might not be money laundering. But, the money laundering statute is not designed to cure that evil. That evil is punished and punished severely by the murder statute. It is punished as the underlying crime.

And so in this case, Mr. Santos and Mr. Diaz -- or Mr. Santos was punished up to the maximum of five years for running an illegal gambling business. He didn't do anything else other than run a gambling business.

And so I think the point is at the end of the day, there are certainly a lot of hypothetical situations that suggest a profits construction might pose some burdens, might not make sense. But if you're

going to look at the burdens on the government in terms of construing the term "proceeds," then you also must look at the consequences of accepting the gross receipts construction. And I think at the outset, nearly every justice up here suggested -- well, that turns every illegal gambling business into a money laundering violation.

The government has no answer to that. Under their interpretation as applied today, then every illegal gambling operator will be guilty of money laundering.

CHIEF JUSTICE ROBERTS: I thought their answer was the money laundering statute covers a whole waterfront of activities besides illegal gambling. And the question is, what did Congress intend when they passed the money laundering statute.

This is kind of the tail wagging the dog. The tail is, well, it presents these problems when you're talking about gambling operations, but there's a whole rest of the dog area where it doesn't present a problem.

MR. VARE: Well, I think what the money laundering statute was intended to do was punish different conduct, separate and distinct from the underlying crime. And that different conduct is

inherent in conducting a financial transaction with the intent to promote the carrying on of the unlawful activity.

I do not think that you can parse the statutory language and only address the term "proceeds" irrespective of its consequences.

In fact, I think the questions directed to me as to the harsh consequences on the government approving profits shows that you have to look at the term "proceeds" in its context. In its context includes not only the burdens on the one hand, but it certainly includes the situation we have here, that every illegal gambling business is automatic money laundering. And that is not what money laundering statute was enacted, it's not what it was written or intended to address.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Vare.

Mr. Roberts, you have four minutes remaining.

REBUTTAL ARGUMENT OF MATTHEW D. ROBERTS
ON BEHALF OF THE PETITIONER

MR. ROBERTS: Thank you.

If I could first address the reasons why this Court should not decide the separate transaction issue itself in this case.

First of all, it's not the question presented here which is limited to the meaning of the statutory term "proceeds." Respondents didn't present any alternative question in their briefs in opposition. And, in fact, they don't present an alternative question presented even in their briefs on the merits. They're just using the concern about merger as a reason to decide that proceeds means profit.

The separate transaction issue was decided against Respondents adversely on direct appeal in the Febus case, as my brother on the other side acknowledged. And those kinds of issues that are decided adversely on direct appeal shouldn't be relitigated.

The issue wasn't raised in the separate transaction issue, it wasn't raised in the Section 2255 issues, and wasn't addressed by the courts below in these collateral proceedings.

At most, we say it should be left open for another case that presents -- that presents the issue. Beyond that, if this Court thought that something should be left open for the court below to address, the court below could address a range of possible ways to deal with ensuring a separation, for example, Justice Stevens's suggestion that an illegal gambling business

under the statute itself entails the payment of winners and the payment of employees, although we don't think that it does.

But a profits definition is not the way to address concerns about overlap for the underlying offense, because it makes no sense in the broader context of the statute.

It would create significant uncertainty about the scope of the statute because of the absence of accounting rules. It would make proof very difficult as a general matter because of the absence of those rules and because criminals often don't keep accounting records. It would exclude numerous concealment transactions that Congress had no reason not to cover, and it would cripple the government's ability to prosecute professional money launderers, which are really a significant part of the problem that Congress was addressing.

If the Court has no further questions, we would ask that the judgments of the court of appeals be reversed.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon at 12:00 noon, the case in the above-entitled matter was submitted.)

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